IN THE

Supreme Court of the United States

October Term, 1940

No. 586 15

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,

Appellant,

v.

DOROTHEA T. FRANK,

Appellee.

ON APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR APPELLANT IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS APPEAL

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LIST OF AUTHORITIES

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STATUTES

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No. 586

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against

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BRIEF FOR APPELLANT IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS APPEAL

This brief is submitted in opposition to the motion of the appellee to dismiss the appeal herein on the ground that the appeal is "improperly directed to the Appellate Term of the Supreme Court of the State of New York, First Department, instead of the Municipal Court of the City of New York, Borough of Manhattan, Ninth District."

The appellee relies, in support of the motion, upon the fact that under the New York practice the judgment of the Appellate Term affirming the judgment of the Municipal Court was remitted to the Municipal Court for enforcement, the record was returned there (New York City Municipal Court Code, §163, N. Y. Laws of 1915, Ch. 279, p. 896), and the judgment of the Appellate Term was entered in the office of the clerk of the Municipal Court (New York Civil Practice Act §629, N. Y. Laws of 1920, Ch. 925, Vol. 4, p. 220, as amended by Laws of 1936, Ch. 656, p. 1435).

The contention that the appeal should therefore have been "directed to" the Municipal Court overlooks the following facts: This Court can review only a "final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had" (43 Stat. 936, 937; 28 U. S. C. §344). The judgment of affirmance in the Appellate Term was a final judgment rendered by the court in accordance with the New York Constitution (Art. 6, Sec. 8) and Civil Practice Act (§584, Laws of 1920, Ch. 925, Vol. 4, p. 205). Since the Appellate Division of the Supreme Court denied leave to appeal further (R. 44), the Appellate Term was the highest state court in which a decision could be had in the case at bar. The judgment of course remained a judgment of the Appellate Term despite the fact that it was required to be entered on the records of the Municipal Court clerk. In fact, the judgment of the Appellate Term had previously been entered in the office of the clerk of New York County (R. 41, 43), who is the clerk of the Appellate Term (New York Civil Practice Act, §701, N. Y. Laws of 1920, Ch. 925, Vol. 4, p. 23). If, therefore, this appeal had sought a review of the Municipal Court judgment, it might have been dismissed. *Second National Bank* v. *First National Bank*, 242 U. S. 630 (1917).

The appellee urges, however, that merely because at the time the appeal to this Court was allowed the record had been returned to the Municipal Court it was improper to "direct the appeal" to the Appellate Term. The order of this Court allowing the appeal directed the clerk of the Appellate Term to prepare and certify a transcript of record and transmit it to this Court (R. 47). Pursuant to this order the Appellate Term procured a return of the record from the Municipal Court and caused it to be filed with the clerk of this Court (R. 50). In adopting this practice the appellant merely followed the procedure which this Court has outlined and approved.

Thus, in *Atherton* v. *Fowler*, 91 U. S. 143 (1875), this Court sustained, against a motion to dismiss, a writ of error directed to the Supreme Court of California to review a judgment of that court modifying a lower court judgment. After stating (p. 146) that "it is, perhaps, safe to say that a writ of error will never be dismissed for want of jurisdiction, because it is directed to the highest court in which a decision was and could be had," the Court said:

> "The rule may, therefore, be stated to be that if the highest court has, after judgment, sent its record and judgment in accordance with the law of the State to an inferior court for safe keeping, and no longer has them in its own possession, we may send our writ either to the highest court or to the inferior court. If the highest court can and will, in obedience to the requirement of the writ, procure a return of the record and judgment from the inferior court, and send them to us, no writ need go to the inferior court; but, if it fails to do this we may ourselves send direct to the court having the record in its custody and under its control. So, too, if we know that

> the record is in the possession of the inferior court, and not in the highest court, we may send there without first calling upon the highest court; but if the law requires the highest court to retain its own records, and they are not in practice sent down to the inferior court, our writ can only go to the highest court. That court, being the only custodian of its own records, is alone authorized to certify them to us" (p. 148).

The cases cited by appellee are not in point. Four[1] of them arose in states whose practice was obviously different from that of New York. In each of them, the higher court did not render a judgment, but directed the lower court to render judgment in accordance with its determination of the appeal, and returned the record to the lower court. It was held that the writ of error or writ of certiorari from this Court could properly be directed to the lower court to review its judgment, which had been rendered at the direction of the higher court. In the instant case, however, a judgment has been rendered by the highest court in which a decision could be had. Appellee's motion shows on its face that these cases are not in point, for appellee concedes that there was a "judgment of the Appellate Term" (Appellee's motion, p. 3).

In *Hodges* v. *Snyder*, 261 U. S. 600 (1923), likewise relied upon by the appellee, this Court denied a motion to dismiss a writ of error directed to a Circuit Court of South Dakota. The judgment to be reviewed was a judgment of the Supreme Court of South Dakota reversing a

[1] *Central New England Ry. Co.* v. *Boston & A. R. Co.*, 279 U. S. 415 (1929); *Myers* v. *International Trust Co.*, 273 U. S. 380 (1927); *Diggs* v. *L. L. Cohee & Co.*, 268 U. S. 638 (1925); *Wedding* v. *Meyler*, 192 U. S. 573 (1904).

prior judgment of the Circuit Court, but under the local practice the record on appeal had been remitted to the Circuit Court with copies of the judgment and opinion of the Supreme Court, and this Court held that under these circumstances the writ was properly directed to the Circuit Court. It was not held that the writ might not likewise have been properly directed to the Supreme Court. See also *Polleys* v. *Black River Improvement Co.*, 113 U. S. 81 (1885).

To sum up, the appeal herein properly sought a review of the judgment of the Appellate Term rather than that of the Municipal Court, and the practice followed in obtaining the record was one approved by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the appellee's motion should be denied.

Respectfully submitted,

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